Tay Way Boon & Ors v Omar Marican Holdings Sdn Bhd & Ors

HIGH COURT (PENANG) — CIVIL SUIT NO 23-208-88
MOHAMED DZAIDDIN J
25 MAY 1990

Civil Procedure — Garnishee proceedings — Interested party intervening — Assignment of debt in favour of intervening party — Whether a conditional assignment — Whether assignment prevails over judgment creditor's claim — Rules of the High Court 1980, O 49 rr 1 & 6

The judgment creditors obtained a garnishee order nisi against a garnishee for money due from the garnishee to the judgment debtors. An interested party applied to intervene in the proceedings, claiming to be entitled to the money by virtue of a deed of assignment by which the second judgment debtor, in consideration of a loan of $300,000 granted by the interested party to the second judgment debtor, had assigned to the interested party all payments and debts due from the garnishee to the judgment debtors. The interested party also relied on a letter written by the second judgment debtor to the garnishee purporting to give an irrevocable authority to the garnishee to pay to the interested party moneys due from the garnishee to the second judgment debtor under a certain contract.

After hearing the parties, the senior assistant registrar made a garnishee order absolute ordering the garnishee to pay to the judgment creditors the sum of $53,954.14. The interested party appealed.

It was contended for the interested party that it had priority over the judgment creditors on the moneys because the assignment was absolute and was executed one year before the judgment creditors obtained judgment against the judgment debtors. It was also contended that the letter constituted a valid equitable assignment which would also rank in priority to the garnishee order.

Held, allowing the interested party's appeal:

(1) The assignment was an absolute assignment in the sense that the second judgment debtor had assigned to the interested party all moneys due and payable to him by the garnishee under the said contract until his loan of $300,000 was fully satisfied or repaid. Insofar as the assignment was concerned, it was clear that there was no condition attached except a proviso that in the event of the interested party receiving moneys in excess of the loan, the interested party agreed to refund any such excess to the second judgment debtor.

(2) The letter constituted a valid equitable assignment by the second judgment debtor in favour of the interested party. The garnishor cannot attach a debt which had been equitably assigned.

(3) The allegation that the deed of assignment was not made bona fide and that it was executed to overcome the execution of the judgment which the judgment creditors would subsequently enforce against the judgment debtors was unfounded. It was unthinkable for the interested party to collude with the judgment debtors in accepting a bogus deed of assignment when on the facts it was clearly shown that the interested party had assisted the second judgment debtor in providing a loan of $300,000 for him to implement his contract with the garnishee. It required a higher burden of proof on the judgment creditors to show mala fide.

[Bahasa Malaysia summary

Pemiutang penghakiman memperolehi perintah garnisan nisi terhadap seorang yang digarnis untuk wang yang harus dibayar oleh yang digarnis kepada penghutang penghakiman. Satu pihak yang berkepentingan memohon untuk mencelah di dalam prosiding itu, menuntut bahawa ia berhak kepada wang itu mengikut satu suratikatan penyerahan hak dengan mana penghutang kedua, sebagai membalas satu pinjaman $300,000 yang diberikan oleh pihak yang berkepentingan kepada penghutang kedua, telah menyerahkan hak atas semua bayaran dan hutang daripada yang digarnis kepada penghutang kepada pihak yang berkepentingan. Pihak yang berkepentingan juga bergantung kepada sepucuk surat bertulis oleh penghutang kedua kepada yang digarnis kononnya memberikan kuasa yang tidak boleh dimansuhkan kepada yang digarnis untuk membayar kepada pihak yang berkepentingan wang yang harus dibayar oleh yang digarnis kepada penghutang di bawah suatu kontrak.

Setelah mendengar pihak-pihak yang berkenaan, penolong kanan pendaftar telah mebuat perintah garnisan mutlak memerintahkan yang digarnis membayar kepada pemiutang sejumlah $53, 954.14. Pihak yang berkepentingan merayu. Telah dihujahkan bagi yang berkepentingan bahawa ia mempunyai prioriti di atas pemiutang untuk wang itu kerana penyerahan hak itu adalah mutlak dan telah dilaksanakan satu tahun sebelum pemiutang memperolehi penghakiman terhadap penghutang. Juga dihujahkan bahawa surat itu merupakan penyerahan hak ekuiti sah yang boleh mengatasi perintah garnisan itu.

Diputuskan, membenarkan rayuan itu:

(1) Penyerahan hak itu adalah mutlak dalam ertikata yang penghutang kedua telah menyerah hak kepada pihak yang berkepentingan atas semua wang yang mesti dibayar kepadanya oleh yang digarnis di bawah satu kontrak sehingga pinjamanya sebanyak $300,000 dilunaskan atau dibayar balik. Sejauh mana penyerahan hak itu adalah berkenaan, adalah jelas bahawa tidak terdapat syarat yang dinyatakan kecuali satu proviso bahawa jika pihak yang berkepentingan menerima wang melebihi pinjaman itu, pihak yang berkepentingan itu bersetuju membayar balik wang yang lebih itu kepada penghutang kedua.

(2) Surat itu merupakan satu penyerahan hak ekuiti yang sah oleh penghutang kedua kepada pihak yang berkepentingan. Penggarnis tidak boleh menahan satu hutang yang telah diserah hak secara ekuiti.

(3) Dakwaan bahawa suratikatan penyerahan hak tidak dibuat bona fide dan bahawa ia dilaksanakan untuk mengatasi perlaksanaan penghakiman yang akan dilaksanakan kemudiannya oleh pemiutang terhadap penghutang adalah tidak berasas. Tidak dapat difikirkan yang pihak yang berkepentingan itu akan bermuafakat dengan penghutang dalam menerima suratikatan penyerahan hak yang palsu bila keadaan kes ini jelas menunjukkan bahawa pihak yang berkepentingan telah membantu penghutang kedua dalam memberikan pinjaman $300,000 kepadanya untuk mejayakan kontraknya dengan yang digarnis. Pemiutang perlu memuaskan beban pembuktian yang lebih tinggi untuk menunjukkan mala fide.]

[*Editorial Note*: The judgment creditors appealed to the Supreme Court vide Civil Appeal No 03-62-90. The appeal was heard by the Supreme Court on 26 November 1990 and the court (comprising Lee Hun Hoe CJ (Borneo), Mohamed Azmi and Mohamed Yusoff SCJJ) dismissed the appeal.]

Cases referred to

1 *Yeo Chiang Swee* v *United Decorators* [1933] MLJ 85 (folld)

2 *Holt* v *Heatherfield Trust Ltd & G & T Bridgewater Ltd* [1942] 1 All ER 404 (folld)
3 *United Overseas Bank Ltd* v *Singapore Engineers Ltd* [1966] 2 MLJ 267 (folld)
4 *Malayawata Steel Bhd* v *Government of Malaysia & Anor* [1975] 1 MLJ 22 (distd)
5 *Tancard* v *Delagoa Bay and East Africa Railway* (1889) 23 QBD 239 (refd)

Legislation referred to
Rules of the High Court 1980 O 49 rr 1, 6
Law of Property Act 1925 [UK]

Raziah bte Fakir Mohamed for the interested party.
Ajmer Singh Sandhu for the judgment creditors.

Cur Adv Vult

Mohamed Dzaiddin J: In this appeal Kewangan KGN Bhd, the interested party under O 49 r 6 of the Rules of the High Court 1980, was dissatisfied with the decision of the penolong kanan pendaftar given on 7 September 1989 granting the judgment creditors a garnishee order absolute in respect of all moneys due or accruing from Majlis Perbandaran Pulau Pinang, the garnishee, to the judgment debtors to answer the judgment dated 27 July 1989 given against the judgment debtors.

The facts leading to this appeal are these. By a writ of summons and the statement of claim filed on 17 August 1988, the judgment creditors as plaintiffs sued the judgment debtors for breach of a written agreement dated 9 February 1988 made between the plaintiffs and the first and second-named judgment debtors, and which was guaranteed by the remaining debtors. The judgment creditors claimed for money owed in respect of services and works rendered and for goods sold and delivered to the first and second-named judgment debtors. On 27 July 1989, they obtained judgment against the debtors in the sum of $347,590.80 with interests and costs. Then, by summons-in-chambers filed on 28 July 1989 the judgment creditors applied under O 49 r 1 Rules of the High Court 1980 for a garnishment order nisi against Majlis Perbandaran Pulau Pinang for money due from them to the judgment debtors for a total sum of $53,954.14. The said order nisi was accordingly granted by the registrar on 31 July 1989. In the meantime, Kewangan KGN Bhd ('KGN') applied to intervene in the said proceedings under O 49 r 6. This rule provides that if in garnishee proceedings it is brought to the notice of the court that some other person than the judgment debtor is or claims to be entitled to the debt sought to be attached, the court may order that person to attend before the court and state the nature of his claim with particulars thereof. However, after hearing the parties herein, the registrar made a garnishment order absolute on 7 September 1989 ordering Majlis Perbandaran Pulau Pinang to forthwith pay to the judgment creditors the aforesaid sum of $53,954.14.

In the supporting affidavit of Samsuddin bin Md Jali (lampiran 44) affirmed on 2 September 1989, the deponent claimed that KGN was entitled to the money due from Majlis Perbandaran Pulau Pinang by virtue of a deed of assignment dated 27 August 1988 entered into between KGN and the second-named judgment debtor ('the said debtor'), where in consideration of a loan of $300,000 granted by KGN to the said debtor, the latter assigned all payments and debts due from Majlis Perbandaran Pulau Pinang to them. KGN also relied on a letter dated 26 August 1988 written by the said debtor to Yang Di Pertua, Majlis Perbandaran Pulau Pinang, purporting to give an irrevocable authority to Majlis Perbandaan Pulau Pinang to pay KGN all moneys due from Majlis Perbandaran Pulau Pinang to the said debtor under the contract No 146/87 dated 26 January 1988.

Before me, Cik Raziah for KGN, submitted that KGN had priority on the moneys due from Majlis Perbandaran Pulau Pinang over the judgment creditors because the assignment was absolute and was executed one year before the judgment creditors obtained judgment against the judgment debtors. Counsel relied on *Yeo Chiang Swee* v *United Decorators*[1] and *Holt* v *Heatherfield Trust Ltd & G & T Bridgewater Ltd.*[2] Cik Raziah further submitted that the letter of 26 August 1988 authorizing Majlis Perbandaran Pulau Pinang to forward all payments or debts due to the judgment debtors direct to KGN constituted a valid equitable assignment which would also rank in priority to the garnishment order. She relied on the authority in *United Overseas Bank Ltd* v *Singapore Engineers Ltd.*[3]

In response to Cik Raziah's argument, Encik Ajmer submitted that the assignment was not a valid assignment. It was a conditional assignment because under para 2 of the contract No 146/87 dated 26 January 1988 made between Majlis Perbandaran Pulau Pinang and the said debtor, the payment for the consideration of the contract was conditional upon the contractor rendering to Majlis Perbandaran Pulau Pinang a true and proper account. Relying on the authority in *Malayawata Steel Bhd* v *Government of Malaysia & Anor*[4] counsel submitted that the said assignment being conditional was therefore unenforceable. Counsel further submitted that the assignment was made to overcome any judgment which the judgment creditors would obtain against the judgment debtors because it was executed just a day after the judgment debtors were served with the writ of summons by the judgment creditors. In fact, on this point Cik Raziah informed me that it was just coincidental that the said assignment was executed on 27 August 1988.

Therefore, the only issue in this appeal revolves on the deed of assignment. If it is a valid assignment, it follows that the question of priority is decisive. Let me first examine the relevant terms of the deed of assignment dated 27 August 1988. This assignment was given

by the said debtor to KGN as security for a loan of a sum of $300,000 to enable him to carry out the contract works granted by Majlis Perbandaran Pulau Pinang to him under contract No 146/87 dated 26 January 1988. The said contract which involved the collection and disposal of refuse within Penang Island was for a period of two years commencing 1 February 1986 until 31 January 1990. Under the said contract the consideration was the payment of a sum of $53,954.14 per month, which be it noted, shall only be paid after being certified by the Pengarah Perkhidmatan Kesihatan of Majlis Perbandaran Pulau Pinang that it was due and payable. Thereupon, it shall be paid within a period of 14 days or within such extended period as may be determined by Majlis Perbandaran Pulau Pinang, of the rendering of true and proper account by the said debtor to Majlis Perbandaran Pulau Pinang. Clause 1 of the said assignment states that in consideration of KGN advancing from time to time the various sums to the said debtor not exceeding $300,000, the said debtor assigned to KGN all moneys due and payable to him from Majlis Perbandaran Pulau Pinang with effect from 1 October 1988. Next, cl 3 provides that the moneys received shall be deducted by KGN towards the repayment of the said loan of $300,000. Thus, on a proper reading of the said assignment, it is my finding that this is an absolute assignment. Absolute in the sense that the said debtor assigns to KGN all moneys due and payable to him by Majlis Perbandaran Pulau Pinang under the said contract until his loan of $300,000 is fully satisfied or repaid. It cannot be a conditional assignment as submitted by Encik Ajmer. The condition which counsel referred to relates to the contract No 146/87 which concerns the manner of how the payment of $53,954.14 under the second schedule of the said agreement was to be paid. Insofar as the assignment is concerned, it is clear to me that there are no conditions attached, except, a proviso that in the event of KGN receiving moneys in excess of the loan, KGN agreed to refund any such excess to the said debtor. In *Tancard* v *Delagoa Bay and East Africa Railway*,[5] a debt was assigned as security for a loan of money with the proviso that if the assignor repaid the loan, the debt should be reassigned to him. That was held to be an absolute assignment.

With respect, the facts in the present assignment are totally different from what the learned judge in *Malayawata Steel Bhd* v *Government of Malaysia & Anor*[4] had found. There, on the facts, Mohamed Azmi J (as he then was), after analyzing the evidence, found that the assignment was subject to certain conditions and was not intended to be absolute. He based his finding after gathering the arrangements contained in several letters exchanged between the appellants and the respondents. In the present case, the terms in the said assignment are clear and enforceable. For reasons stated above, in my judgment, the said assignment is a valid one.

Further, I am of opinion that the 'Letter of consent' dated 26 August 1988 signed by the said debtor and given to the Yang Di Pertua, Majlis Perbandaran Pulau Pinang which was duly acknowledged, constitutes a valid equitable assignment by the said debtor in favour of KGN. The material part of this letter states as follows:

> Whereas I have assigned the benefit of the contract to Kewangan KGN Bhd of No 12-16 Church Street, 10200 Penang in consideration for a loan of Malaysian Ringgit three hundred thousand only (M$300,000).
>
> Now I hereby give you an irrevocable authority to pay Kewangan KGN Bhd all moneys due to me under the contract and such payments will execute a valid discharge for all moneys due to me under the said contract.

In *United Overseas Bank Ltd* v *Singapore Engineers Ltd*,[3] Gim Guan Co wrote to the Chairman, Housing and Development Board as follows:

> We hereby authorize you to make all future payments direct to our banker, the United Chinese Bank Ltd, Bonham Building, Singapore against bills submitted to you for projects undertaken by us for the board.

The issue raised before Winslow J was whether the above letter constituted a valid equitable assignment to the plaintiff bank. The learned judge, after going through the authorities cited by counsel, held that the letter in question was a valid equitable assignment.

In *Yeo Chiang Swee*,[1] the headnotes state that where a judgment debtor had before judgment assigned the benefit of a contract to another and the money payable under the contract was afterwards paid to the sheriff under a notice of garnishment, the judgment creditor was not entitled to payment out to him of such moneys, the judgment debtor having parted with his interest therein prior to the date of garnishment notice. Terrell J delivering an oral judgment held that the plaintiffs were entitled to payment of the money as against the judgment creditor.

In *Holt*'s case,[2] which was a case decided in the King's Bench Division by Atkinson J regarding an assignment within the meaning of the English Law of Property Act 1925, the editorial note stated that for the purpose of deciding the question of priority, was it the date on which the assignment became a legal assignment or was it sufficient that an equitable assignment had been executed. The note stated that upon a review of the cases, the judge has had regard to the fact that a garnishee order can only attach debts which the debtor himself is free to deal with at the time the garnishee order nisi is served. The debtor himself is bound by an equitable assignment which is independent of the giving of notice. The garnishor, therefore, cannot attach a debt which has been equitably assigned, or in other words, the equitable assignee has priority over the person serving the garnishee order.

Therefore, applying the principles of the above cases to the instant case, in my judgment, KGN being the equitable assignee has priority over the judgment creditor with respect to moneys due from Majlis Perbandaran Pulau Pinang, the subject matter of the garnishment order absolute.

Finally, regarding the suggestion of Encik Ajmer that the deed of assignment was not made bona fide and that it was executed to overcome the execution of judgment which the judgment creditors would subsequently enforce against the judgment debtors, I am satisfied, after giving due consideration, that this allegation was unfounded. It is unthinkable for KGN to collude with the judgment debtors in executing a 'bogus' deed of assignment, when on the facts it is clearly shown that KGN had assisted the second-named judgment debtor in providing a loan of $300,000 for him to implement his contract with Majlis Perbandaran Pulau Pinang. At any rate, it must be remembered that it requires a higher burden of proof on the judgment creditor to show mala fide.

In the result and for the reasons stated above, I allow this appeal with costs. The garnishment order absolute is hereby rescinded and all moneys held thereunder shall now be paid to KGN under the deed of assignment.

Appeal allowed.

Solicitors: *Raziah & Partners*; *Ajmer Singh Sandhu & Co.*

Reported by *PS Ranjan*

Grenek Sdn Bhd v Lew Wa Chow

HIGH COURT (PENANG) — SUIT NO 23-42-86
MOHAMED DZAIDDIN J
16 MARCH 1990

Civil Procedure — Order of committal — Defendant failing to obey order of court — Flaw in order of court — Effect of flaw on order of committal — Rules of the High Court 1980, O 45 r 5(1)

By a notice of motion, the plaintiff applies for an order of committal against the defendant for contempt of court for having failed to obey the order of the court whereby the defendant was required to disclose the whereabouts and full identity of each of his accounts whether within or without the jurisdiction.

Held, dismissing the plaintiff's motion:

(1) The order directs the defendant to disclose the whereabouts and full identity of his accounts whether they are within or outside the jurisdiction of the court. It is an order to do a certain act, which is governed by O 45 r 5(1).

(2) The order is defective for non-compliance with O 45 r 5(1) in the sense that the act which was required to be done did not specify the time within which it should be complied with. There was no subsequent order made to include the time or to extend it to enable the defendant to comply with the term of the part of the order. This failure makes the enforcement of the order defective and the defendant would be entitled to be discharged from the contemptuous act.

[Bahasa Malaysia summary

Dengan notis usul, plaintif memohon untuk perintah komital terhadap defendan kerana menghina mahkamah. Defendan telah gagal mengikut perintah mahkamah dalam mana defendan dikehendaki mendedahkan butir-butir lengkap tentang akaun-akaunnya samada di dalam atau di luar bidang kuasa dan di mana mereka berada.

Diputuskan, menolak usul plaintif:

(1) Perintah itu mengarahkan defendan mendedahkan butir-butir lengkap akaun-akaunnya samada di dalam atau di luar bidang kuasa mahkamah serta di mana mereka berada. Ia adalah satu perintah melakukan sesuatu, yang dikawal oleh A 45 k 5(1).

(2) Perintah itu tidak sempurna lantaran ketidakpatuhan dengan A 45 k 5(1) kerana perbuatan yang harus dilakukan itu tidak menyebut tempoh masa dalam mana perintah itu mesti dipatuhi. Tidak terdapat perintah berikutan yang dibuat untuk menyatakan tempoh masa atau untuk melanjutkan tempoh masa untuk membolehkan defendan mematuhi bahagian berkenaan dalam perintah itu. Kegagalan ini mengakibatkan perlaksanaan perintah itu tidak sempurna dan defendan harus dilepaskan daripada dakwaan menghina mahkamah.]

Legislation referred to
Rules of the High Court 1980 O 45 r 5(1)

S Kulasegaran for the plaintiff.
V Sithambaram for the defendant.

Cur Adv Vult

Mohamed Dzaiddin J: By this notice of motion the plaintiff applies for an order of committal against the defendant for contempt of court for having failed to obey the order of this court made on 1 December 1986. The relevant part of the said order states as follows:

> ... It is ordered that the defendant, Lew Wa Chow whether by himself his agent or attorney be restrained by an injunction from dealing with and/or disposing of all or any of his assets until after the disposal of this case or such other Order as this Honourable Court may make and it is further ordered that the defendant disclose the whereabouts and full identity of each of his accounts whether within or without the jurisdiction and that the defendant be at liberty to apply to set aside this order within 30 days of the date of this order and the costs of and incidental to this application be costs in the cause.

Clearly, the above order is a Mareva injunction restraining the defendant from dealing and/or disposing of the assets or removing them from the jurisdiction of this court. However, the complaint of the plaintiff against the defendant in this contempt proceeding concerned the second part of the said order, which is 'it is further ordered that the defendant disclose the whereabouts